

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC L APPEAL NO. E007 OF 2023

SIMON GITHENDU NJUGUNA.....1ST
APPELLANT

VERSUS

ELIAS MUIRURI.....1ST
RESPONDENT

MARGARET WAITHERERO.....2ND
RESPONDENT

EKIRA WANJIKU.....3RD
RESPONDENT

NJANTHI MUIRURI.....4TH
RESPONDENT

***(Being an Appeal against the Judgement of Hon. P.
Achieng' SPM in Ngong ELC No. 035 of 2022 delivered on
29th June 2023)***

JUDGEMENT

1. In her **Judgement dated 29th June 2023 in Ngong ELC Case No. 035 of 2022**, Hon. P.Achieng' (SPM) dismissed the Appellant's case and entered judgement in favour of the Respondents' in their counterclaim.
2. Aggrieved by the said decision, the Appellant filed a **Memorandum of Appeal dated 8th July 2023** seeking that the judgement be set aside and that this Appeal be allowed on grounds that:

- 1. The learned Magistrate erred in law and fact by failing to appreciate that the Appellant was a joint proprietor of land parcel No. Ngong/Ngong/8868.***

- 2. The learned Magistrate erred in law and fact by failing to appreciate that upon the death of a joint proprietor, the remaining interest in the land number Ngong/Ngong/8868 passed to the surviving joint proprietor under the doctrine of survivorship.***

- 3. The learned Magistrate erred in law and fact by failing to appreciate that the ownership of parcel Ngong/Ngong/8868 was properly registered in the names of the Appellant and***

the deceased despite not finding any proof of fraud or illegality in the registration process.

4. The learned Magistrate erred in law and fact by failing to scrutinise the evidence on record thus being misdirected that the evidence on record was in favour of the Respondents.

3. The Appellant seeks for orders that;

a. The Appeal be allowed.

b. The judgement at the lower court be set aside and judgement be entered in favour of the Appellant that property Ngong/Ngong/8868 was jointly registered in the names of the Appellant and the deceased, and the Appellant was the sole owner of the suit property under the doctrine of survivorship.

c. Costs and interest at Court rates.

4. This Appeal was canvassed by way of written submissions.

Submissions of the Appellant

5. Counsel outlined that the single issue for determination was whether the Appeal is merited.
6. It was Counsel's submission that the Learned Trial Magistrate erred by failing to appreciate that the Appellant was a joint proprietor of land parcel number Ngong/Ngong/8868. The Appellant contends that the trial court erred in failing to appreciate that the suit property was jointly registered in his and his mother's names under the Land Registration Act, 2012, before the 2016 amendment. It is his case that joint tenancy existed since no distinct shares were indicated in the title. It was further submitted that the 1st, 2nd and 3rd Respondents are his siblings who were given land by their mother, Beth Nyambura Njuguna before her demise. The suit property, was then registered in the names of the Appellant and his mother with the intention of leaving it to the Appellant whom she had not yet given any land. The 1st, 2nd and 3rd Respondents never raised any issue with the distribution of her property during her lifetime. Hence, the suit property duly belongs to the Appellant who was registered as the co-owner. Reliance was placed on the following cases which support the principle that where property is

registered in joint names without apportionment, it is held as a joint tenancy, and the right of survivorship applies.

Rachael Wanjiru Gathuru v Peter Ndeere Tumbo & Another [2021] eKLR; In re Estate of Dorica Lumire Mapesa (Deceased) [2018] eKLR and Isabel Chelangat v Samuel Tiro Rotich & 5 Others [2012] eKLR.

7. It was further submitted that upon his mother's demise on 11th June 2019, her interest in the land automatically vested in him as the surviving joint tenant under the doctrine of *jus accrescendi*. He contends that under **Section 91(1) of the Land Registration Act** which was the applicable law at the time, the surviving joint tenant becomes the absolute owner upon production of proof of death, without the need for succession proceedings. Reference was made to the cases of **In re Estate Dorica Lumire Mapesa (Deceased) (supra)** and **Republic v Town Clerk & another Ex-Parte Muriithi Murage & 3 others [2017] eKLR.**

8. Counsel also contested the allegation of fraud on grounds that no evidence was tendered by the Respondents as proof and the veracity of the documents presented was

questionable because they bore different signatures and thumbprints. It was also his submission that a letter from the Director of Public Prosecutions absolved him of any wrong doing. It was also submitted that the 1st Respondent had sued their mother in ELC Nairobi case No. 554 of 2012 accusing the Appellant and their mother of transferring the property in their joint names, but the suit was later withdrawn. It is his submission that the documents produced confirmed that his late mother had all intentions of owning the suit property jointly with the Appellant.

9. It was also submitted that in the probate case 301 of 2020 at Kandara Law Courts, the Appellant objected to the inclusion of the suit property in the succession proceedings because it was jointly held by him and his late mother. It was submitted that an application for revocation of the said grant was filed and then the instant suit was also filed to determine the question of ownership.

10. He prays that the judgement of the lower court should be set aside and the prayers sought in the plaint be allowed.

Submissions of the Respondents

11. The Respondents submit that they are the Administrators of the Estate of their late mother Beth Nyambura Njuguna through the Letters of Administration issued to them on 4th March 2021 in **Kandara PMCC succession Cause No. 301 of 2020; In the matter of the Estate of Beth Nyambura Njuguna (deceased).**

12. They contend the allegation that the Appellant is the joint owner of the suit property since the same was fraudulently obtained hence bestowed no proprietary rights on him. It was their claim that their late mother was allotted parcel 1134/Residential - Ongata Rongai Trading Centre on 23rd December 1996. Further that, sometime in June 2012, the Appellant tried to transfer the property to himself as a gift so as to sell it to one Elsiha Toipon Mositet. When their mother learnt of this, she wrote letters to various government entities complaining of the fraudulent conversion. The attempted transfer of that property to Elisha Toipon was then cancelled by the Kajiado County Council. However, since money had exchanged hands, their mother agreed to transfer property 1134/Residential - Ongata Rongai Trading Centre to the said Eisha Toipon Mositet for a further consideration

of Kshs. 1,350,000 as well as in exchange of title Ngong/Ngong/8868. This was recorded in the agreement dated 18th October 2012 and the suit property was to be registered in her sole name. However, the Appellant caused himself to be registered as a joint owner resulting to the title issued on 3rd October 2014. It is submitted that this time their mother was sickly and incoherent. Further that the Appellant denounced his witness statement where he claimed that the registration as joint owners was undertaken as a Kikuyu custom since he was the last born. It is their prayer that the said registration should therefore be revoked under **Section 80 of the Land Registration Act** having been fraudulently undertaken contrary to **Section 26 of the Land registration Act**. This was the holding in the case of **Gladys Wanjiru Ngacha v Treresa Chepsaat & 4 others [2013] eKLR** where the Court held that fraud was a question of fact.

Analysis and Determination

13. The Appellant has lodged this appeal citing four (4) grounds which can be compressed as follows;

- i. That the learned Trial Magistrate erred in law and fact by failing to appreciate that upon the death of a joint proprietor, the remaining interest in the land number Ngong/Ngong/8868 passed to the surviving joint proprietor under the doctrine of survivorship.*
- ii. That the learned Trial Magistrate erred in law and fact by failing to appreciate that the ownership of parcel Ngong/Ngong/8868 was properly registered in the names of the Appellant and the deceased despite not finding any proof of fraud or illegality in the registration process.*
- iii. What orders should issue?*
- iv. Who should bear costs of this Appeal?*

14. This being a first Appeal, the court ought to re-evaluate, re-assess and re-analyze the evidence, then come to its own conclusion while bearing in mind that it did not hear or observe the witnesses.

See **Abok James Odera T/a A.J Odera & Associates Vs. John Patrick Machira T/a Machira & Co. Advocates (2013) KECA 208 (KLR)** which quoted

Kenya Ports Authority Vs. Kuston (Kenya) Limited (2009) 2 EA 212 where the Court of Appeal held;

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

15. Similarly in **Richard Wefwafwa Songoi Vs. Ben Munyifwa Songoi (2020) KECA 942 (KLR)** it was stated thus;

“In Selle Vs. Associated Motor Boat Company Limited (1968) E.A 123 it was expressed thus;

“.....Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the

witnesses and should make due allowance in this respect....”

16. It is the Appellant’s case that the suit property; Ngong/Ngong/8868 was jointly registered in his name and that of his late mother. That upon her demise on 11th June 2019, the same automatically passed to him through the doctrine of survivorship. It is his case that, sometime in February 2020, the 1st, 2nd and 3rd Respondents trespassed upon the suit property, interfered with the management and started collecting rent to the detriment of the Appellant and his family. He therefore sought a permanent injunction restraining them from interfering with the suit property, general damages for trespass, surrender of the rent collected from 18th February 2020 and costs of the suit together with interest.

17. The Respondents had filed a defence and counterclaim in the Lower court claiming that they were all co-administrators of the estate of their late mother Beth Nyambura Njuguna through the Grant of Letters of Administration issued on 4th March 2021 in Kandara PMCC Succession Cause No. 301 of 2020. They contested the claim that suit property had passed on to the Appellant

under the doctrine of survivorship stating that the joint registration was fraudulently undertaken. They claimed that by a Letter of Allotment dated 23rd December 1996, the Deceased was allotted Plot No. 1134/Residential Ongata Rongai T. Centre. That sometime in June 2012, the Appellant attempted to fraudulently transfer it to himself purporting to be a gift from their mother. He also attempted to sell it to one Elisha Toipon Mositet. When the Deceased realized, she wrote several letters to different government entities to complain. She also recorded a statement in which she denied that she had given the plot as a gift or authorised the sale to the said Elisha Toipon Mositet. It is their case that the transfer of plot No. 1134 was then cancelled by Kajiado County Council.

18. It is also the Respondent's case that since the Appellant had already received some money from the said Elisha Toipon, the Deceased was afraid he would get arrested hence she agreed to transfer plot No. 1134 Residential Ongata Rongai T. Centre to Elisha Toipon for a consideration of Kshs. 1,350,000 together with the title for Ngong/Ngong/8868 (the suit property). This was captured in the agreement dated 18th October 2012. They claimed

that the suit property was to be registered in the name of their mother, but the Appellant fraudulently caused it to be registered jointly. The Title deed was issued on 3rd October 2014. They further stated that the Appellant took advantage of their mother's old age and ill health and registered the suit property jointly.

19. They further stated that they opened a joint account in the names of the 1st, 2nd, 3rd respondents and the Appellant and continued collecting rent and managing the property until sometime in August 2020 when the Appellant asked for all the rent on the claim that he owned half of the property and forbade them from collecting rent from one half of the property. This caused them to open another joint account in their three names where rent from the other half was collected. It is their case that the Appellant's claim was pegged on fraud and sought a permanent injunction against his interference with the suit property; his name as a joint owner be cancelled and the suit property be vested upon Beth Nyambura Njuguna; and that the rent collected from one half of the houses be surrendered to the Administrators of the estate of the late Beth Nyambura Njuguna together with costs of the suit.

20. The Appellant produced a Title deed for Ngong/Ngong/ 8868 issued on 3rd October 2014 in favour of Simon Githendu Njuguna and Beth Nyambura Njuguna and a certificate of official search dated 30th March 2021 which confirmed that this was the status at the time.

21. A transfer of plot No. 1134 Residential Ongata Rongai T. Centre from Beth Nyambura Njuguna to the Appellant dated 31st May 2012 was produced. He also produced an agreement for sale and exchange of land dated 27th July 2012 between himself and Beth Nyambura Njuguna as the vendors and one Elisha Toipon Mositet as the purchaser. This agreement states that Elisha T. Mositet would purchase plot No. 1134 for a consideration of Kshs. 1,500,000 and would return title for Ngong/Ngong/8868. This agreement was executed by the Appellant and Beth Njuguna.

22. The Respondents on the other hand produced a handwritten document dated 18th October 2012 for plot No. 1134 Residential Ongata Rongai T. Centre that the said Elisha T. Mositet would pay Beth Nyambura the Kshs. 1,350,000 and shows the plot be registered in her name. This agreement is not signed by the Deceased. It is

however signed by Elisha T. Mositet, Daniel Wuantai and Margaret Waitherero. Another handwritten document showed that the Deceased had received Kshs. 200,000 from Elisha T. Mositet and the balance of Kshs. 1,150,000 was to be paid later.

23. It is not in dispute that Ngong/Ngong/6668 is registered in the names of Beth Nyambura Njuguna and Simon Githendu Njuguna as joint proprietors.

24. The Respondents produced a bundle of correspondences from between October 2012 to February 2013 allegedly written by the Deceased complaining of illegal transfer of plot No. 1134. The Appellant however produced an Investigation report dated 7th October 2013 from the Director of Public Prosecution which stated that there was no fraud on the transfer of plot 1134 from the Appellant to Elisha Toipan Mositet.

25. The Respondents' position throughout the trial in the lower court was that the Appellant had taken advantage of the Deceased's old age and ill health and registered the suit property in their joint names.

They also claimed that the Deceased's life was threatened but presented no evidence to support this position. Even if there were threats they do not amount to fraud.

26. It should be noted that the title deed to the suit property was issued on 3rd October 2014. The deceased passed on 11th June 2019. What prevented the deceased from having the title rectified in over five years when she was alive. Why didn't she initiate the process of cancellation? Could it be because that was her wish?

27. I have gone through the proceedings at the lower court and I find that the Respondents were not able to prove fraud against the Appellant. I find that the Learned Trial Magistrate erred when she observed thus;

“From the documents produced by the defendants, at no time did the deceased express her intention to have joint registration of land parcel number Ngong/Ngong/8868 with the plaintiff. The said joint registration is therefore questionable. The plaintiff did not present any evidence to counter the documentary evidence presented by the defendants, which clearly shows that he did not acquire joint registration of the land legally or

procedurally. There is however no express evidence to show that he committed a fraud. The plaintiff's claim cannot succeed and it is dismissed."

28. The question would be; What evidence led the Learned Trial Magistrate to come to the conclusion that;

"The said joint registration is therefore questionable....." she went further to state;

"The Plaintiff did not present any evidence to counter the documentary evidence presented by the defendants which clearly shows that he did not acquire joint registration of the land legally and procedurally"

With due respect, the Learned Trial Magistrate erred; it was incumbent upon the Defendants to prove that the joint registration have been procured fraudulently and not the other way round.

29. **Sections 107 to 108 of the Evidence Act** is clear that the burden was on the Defendant's to prove fraud. They did not. The burden did not shift to the Appellant. She also observed that;

“There is however no express evidence to show that he committed fraud.....”

So what was the basis of her finding?

30. In the case of **Teleposta Pension Scheme Registered Trustees Vs. Inter Counties Importers and Exporters Limited & 4 others (2016) eKLR** the court held as follows;

“It is trite law that whoever alleges must prove. It was therefore incumbent upon the plaintiff to prove fraud allegations against the Defendants to the required standard. The standard of proof in fraud cases is higher than that in ordinary civil cases. As was observed in Njuwangu Holdings Limited Vs. Langata KPA & 5 Others; the standard of proving fraud in civil cases the courts have consistently held is higher than on a balance of probabilities. An allegation of fraud is a serious indictment against a party to whom it is made and though the standard of proof is not beyond a reasonable doubt as in criminal cases, it is no doubt near there but is certainly higher than on a balance of probability and thus when a party in a civil matter makes an

allegation of fraud against a party, he should be prepared to tender and adduce evidence to prove the allegation to the required standard. In the present case, I am afraid the fraud allegations against the 1st defendant have been generalized and lack specificity and are generally unproved....”

Thus mere suspicion of fraud cannot suffice. It is court’s findings that besides generalisations the plaintiff has not proved that the 1st Defendant, acquired the title illegally or through a corrupt scheme. More importantly, there is no proof of fraud allegations against the transferee, the 1st Defendant, to warrant the cancellation of the title.”

I am guided by the above authority in finding that the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the suit property was properly registered in the names of the Appellant and the Deceased despite not finding any proof of fraud or illegality in the registration process.

31. **Section 91 (4) of the Land Registration Act** , provides that;

“If the land is occupied jointly, no tenant is entitled to any separate share in the land and consequently;-

a) dispositions may be made only by all the joint tenants;

b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; or

c) each joint tenant may transfer their interests into vivos to all the other tenants but no other person and any attempt to so transfer an interest to any other person shall be void.”

I agree with the Appellant’s submission that the suit property was jointly registered in his name and that of his late mother before the 2016 Amendment.

This has not been disputed.

32. In the case of **Rachael Wanjiru Gathuru Vs. Peter Ndeere Tumbo & another (2021) eKLR** the court stated thus;

“That being the law in place at the time and given the relationship between the deceased and Charles

Wairagi the trial Magistrate was entitled to conclude that the deceased and Charles Wairagi; Mbugua were joint tenants. It then follows that the principle of survivorship operates in the case of this property. As stated by the trial Magistrate if the deceased's intention was that upon her demise her share of that land was to be distributed to her children other than Charles Wairagi Mbugua then she would have made all of them co-owners of that particular property. It is also evident that when the deceased distributed the estate of her late husband the appellant did not raise any objection and that she in fact herself benefited from a share of the estate. Given that this was the portion comprising the family home and given that Charles Wairagi Mbugua was her last born son, she more probably than not intended that upon her demise the entire portion would devolve to him in accordance with the Kikuyu custom where upon the demise of the parents the homestead is inherited by the last-born son. In the upshot I find that Land LR. NO. Komothai/Igi/110 was not the free property of the

deceased and is incapable of redistribution to any person(s) other than to Charles Wairagi Mbugua with whom they owned a joint tenants.”

33. **In re Estate of Dorica Lumire Mapesa (Deceased) (2018) eKLR ; Musyoka Judge stated thus;**

“From the green card on record, the said property was registered under the land Registration Act, Laws of Kenya. It was registered in the joint names of the deceased and another without indicating the shares of each of the two proprietors. Registration of property in the names of more than one person is dealt with in sections 91 of the said Act. The relevant provisions state as follows at subsection (4):-

“if land is occupied registered jointly, no tenant is entitled to any separate share in the land and consequently -

a) a dispositions may be made only by all the joint tenants;

b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenant’s jointly or;

c) Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person and any attempt to so transfer an interest to any other person shall be void.”

34. Also in **Isabel Chelangat Vs. Samuel Tiro Rotich & 5 Others (2012) eKLR Munyao J** held thus;

“The matter herein boils down to the rights of joint owners. At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point I have borrowed heavily from two texts, Megary & Wade, The Law of Real Property (2) and Cheshire & Burn’s, Modern Law of Real Property. (3). According to Burn. “.....a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares.....”(4).

35. From the foregoing, it is my view that the Deceased had intended that the suit property be jointly held by herself and the Appellant. It therefore means that the suit

property was not available for distribution among the beneficiaries for the estate of the late Beth Nyambura Njuguna (Deceased).

36. The principle of *jus accrescendi* is that the interest of a joint tenant is extinguished upon death and the survivor becomes the sole owner of the whole interest in the property the subject of the joint tenancy.

Olao J in **Republic Vs. Town Clerk & Another Exparte Murithi Murage & 3 Others (2017) eKLR** citing a passage from **Mukazitoni Josephine Vs. AG (2015) eKLR** stated as follows;

“The Title document to the property has two names and this is concurrent ownership. There is no indication as to whether the property is held by a tenancy-in-common or joint tenancy or tenancy in entirety. When a property is registered in more than one name in the absence of a contrary entry in the register, the property is deemed to be held in a joint tenancy and not a tenancy in common or a tenancy in entirety.” This Court proceeded to hold that the suit plot was held by the deceased and the Interested Party in a joint tenancy.”

37. I find that the Learned Trial Magistrate in law and in fact by failing to appreciate that upon the death of Beth Nyambura Njuguna, the remaining interest in the suit property Ngong/Ngong/8868 passed to the surviving joint proprietor under the doctrine of survivorship.

38. I am of the view that the Appellant herein has made out a good case as against the Respondents.

39. In conclusion I find merit in this appeal and the same is allowed.

40. Consequently,

a) The Judgement dated 25th June 2023 in MC ELC E035 of 2022 is hereby set aside and Judgement is hereby entered in favour of the Appellant in that Land parcel known as Ngong/Ngong/8868 was jointly registered in the names of the Appellant and the Deceased hence the Appellant is now the owner of the suit property under the doctrine of survivorship.

b) That Judgement is entered in favour of the Appellant as per the prayers in the plaint dated

19th May 2021 except the prayer for general damages, for trespass which I decline to allow.

c) That as the Appellant and the Respondents are siblings I order each party to bear own costs of the suit in the Lower court and in this Appeal.

Dated, Signed and Delivered virtually at Kajiado this 13th day of November 2025.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

N/A for the Appellant.

Mr. Kinuthia for the Respondents.

Court Assistant – Peter.